Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-762

CAROL MAUREEN SOSNA,
on behalf of herself and all others
similarly situated,

Appellant,

v.

THE STATE OF IOWA, and A.L. KECK,
individually, and as judge of the
District Court of the State of Iowa
in and for Jackson County,

Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN
DISTRICT OF IOWA

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

The Appellee agrees with Appellants' Statement of Jurisdiction, Constitutional Provisions and Statutes, the questions presented for review which were decided by the lower court, and the form of the question presented for review, on the abstention issue referred to by this court in its Order entered February 19, 1974 noting probable jurisdiction.

STATEMENT OF THE CASE

Appellee agrees with Appellants' Statement of the Case, but some additional background facts may be of some assistance to the court and in essence, these facts may be found in the Appendix on file herein, pages 28-30, Appellants' Answers to Interrogatories.

The plaintiff, herein, Carol Maureen Sosna, commenced her action for a dissolution of marriage in the District Court in and for Jackson County, Iowa, under the provisions of Chapter 598, Code of Iowa, 1971, on or about September 22, 1972, which was approximately *one month* after her arrival in Iowa. In said petition for dissolution the petitioner alleged that her husband, Michael Sosna, respondent in said case, lived at a New York address in New York City. Petitioner further alleged that she was a resident of Green Island, Jackson County, but that she had not been a resident of the State of Iowa for the year last preceeding her filing of her petition and in said petition she requested that the court waive the residency requirement for the reason that it violated her constitutionally protected right to travel.

Michael Sosna was served personally with an original notice at Clinton, Iowa on September 20, 1972. In response to defendant's interrogatories, the plaintiff states that Michael Sosna was physically within the State of Iowa for personal reasons of his own, namely to visit the children of the marriage. On October 24, 1972, Michael Sosna, as respondent in said action, filed a Special Appearance in the District Court alleging that he was a resident of the State of New York, that the Iowa District Court had no authority to waive the statutory requirement that the petitioner reside in Iowa for the year prior to her commencing her action and that therefore, under the provisions of Iowa Code

Section 598.6 that the court did not have jurisdiction of this subject matter nor of the person. Counsel for the plaintiff filed his resistence to the Special Appearance on November 1, 1972, and upon order of the court the case was set down for hearing on November 20, 1972.

On December 27, 1972, Judge A.L. Keck, one of the defendants in this case, filed his ruling on respondent's Special Appearance, wherein he sustained defendant's Special Appearance and dismissed plaintiff's petition for dissolution of marriage.

Appellant, Carol Maureen Sosna, is a young lady, twenty-seven years of age, was born in the State of Illinois, was married in the State of Michigan at age nineteen, she and her husband were domiciled in the State of New York from approximately October, 1967 until August, 1972. Three minor children were born to this marriage who were transported by the plaintiff from their home in New York City to the State of Iowa in August, 1972. The Plaintiff separated from her husband in approximately August, 1971, and, as she states, at that time her husband was guilty of mental cruelty and adultery and both she and her husband discussed a legal separation with their respective attorneys in the State of New York. Their separation lasted for a period of approximately one year and no action for divorce was commenced by either of the parties of the marriage. She has advised that friends of hers lived in Clinton and encouraged her to move to Iowa and approximately *one month* after her arrival in the State of Iowa she commenced her action for dissolution of marriage in the District Court of Jackson County, Iowa.

In her petition in the District Court of Jackson County, the plaintiff has alleged that her petition was filed in good faith, that she seeks custody of the minor

children, that her husband should be required to pay a reasonable sum as permanent child support, that her husband should be required to pay the debts and obligations incurred by the parties during their marriage, that she be awarded the household goods, furniture and furnishings accumulated by the parties during the marriage and that she be awarded the bank accounts now owned by the parties. She states that the proceeds of the sale of their home in the State of New York are being held in escrow and that they can be divided only upon the dissolution of her marriage. The plaintiff further advises that she has never discussed reconciliation with her husband and he has expressed no intention of moving to Iowa, she is short of funds and is presently receiving food stamps and that she receives some income from a photographic studio in which she has some financial interest. It is planned that this business will be expanded to include an "organic food" sales place.

ARGUMENT

DIVISION I

THE STATE OF IOWA IS A QUASI PARTY OR A PARTY BY IMPLICATION TO ANY ACTION SEEKING THE DISSOLUTION OF A MARRIAGE CONTRACT AND HAS A DIRECT INTEREST IN AN ACTION BY PARTIES RESIDENT OR NON-RESIDENT. THIS INTEREST IS BEST PROTECTED FROM THE STATE'S POINT OF VIEW BY A DURATIONAL RESIDENCY REQUIREMENT. THE ONE-YEAR RESIDENCY REQUIREMENT SUFFICIENTLY MEETS BOTH THE TRADITIONAL STANDARD OF THE EQUAL PROTECTION CLAUSE AND ALSO MEETS THE REQUIREMENTS OF THE STRICTER STANDARD OF A COMPELLING STATE INTEREST.

The nature of a divorce or a dissolution of marriage is best stated by the following quote from American Jurisprudence 2d:

> "The right to apply for or obtain a divorce is not a natural one, but is accorded only by reason of statute, and the state has the right to determine who are entitled to use its courts for that purpose and upon what conditions they may do so. Divorce is not among the inalienable rights of man or the rights granted by Magna Charta, the federal or state constitution, or the common law; except at the will of, and subject to any restrictions imposed by, the legislature, divorce has never been recognized as one of the guaranteed privileges of the citizen." 24 Am. Jur. 2d 180.

The public policy in relationship to divorce can generally be stated as follows:

> "Marriage is a relation in which the public is deeply interested, and is subject to proper regulation and control by the state or sovereignty in which it is assumed or exists. The public policy relating to marriage is to foster and protect it, to make it a permanent and public institution, and to prevent separation. This policy finds expression in probably every state in this country in legislative enactments designed to prevent the sundering of the marriage ties for slight or trival causes, or by the agreement of the husband and wife, or in any case except on full and satisfactory proof of such facts as the legislature has declared to be cause for divorce. Such provisions find their justification in this well-recognized interest of the state in the permanency of the marriage relation. The right to a divorce exists by legislative grant, only the marriage contract in this respect being regulated and controlled by the sovereign power, and not being, like ordinary contracts, subject to dissolution by the mutual consent of the contracting parties. As said by the United States Supreme Court: 'Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.'" *Maynard v. Hill*, 125 U.S. 190, 31 L.ed. 654, 8 S. Ct. 723. 24 Am. Jur. 2d 184.

The State of Iowa subscribes to this general public policy.

> "The integrity and permanence of the marital relation is of such vital importance to the welfare of society and to the public generally that the sovereignty or State has always deeply interested itself in all matters pertaining to the dissolution of that relation. While the suit for divorce is nominally between the two parties, the State is always a quasi party. As said in Walker v. Walker, 205 Iowa 395, 398, 217 N.W. 883: 885: 'The nominal plaintiff and defendant are not the only parties to the suit. The state and public are parties by implication.'" *Hopping v. Hopping*, 10 N.W.2d 87 (p. 89-90).

Public policy in Iowa in reference to dissolution of marriage has undergone recent changes. Iowa has become one of the more liberal states in the family law area by enacting its no-fault dissolution of marriage act to replace its divorce statutes. These new statutes are the product of the 63rd General Assembly, Second Session, which law became effective on July 1, 1970. Our present statutes are largely the work of a divorce laws study committee created by the legislature which committee was composed of legislators, lawyers, a priest, a minister and a district court judge. 20 Drake Law Review 211-226. There is no need to go into various changes in the new dissolution of marriage law now current in the State of Iowa, but it is interesting to note that §§598.6 and 598.9, the sections alleged unconstitutional by the Plaintiff herein, were left unchanged. In the words of the author of the above cited Drake Law Review article:

> "Iowa has been careful to retain the requirement that the residence of at least one party be in this state as a necessary basis for assertion of jurisdiction by its courts and those dissolution of marriage actions. Failure to prove the allegations of residence results in dismissal of the action."

From this we may assume that the residence requirements were considered and discussed by the committee and can probably assume that the alleged "arbitrary" one-year requirement was considered by the legislature. Most states have some residency requirements as the basis for divorce or dissolution of marriage and these requirements may vary from six weeks to two years. Am. Jur. Desk Book 2d, 1972, Cumulative Supplement. A random count indicates that over half of the states fall in the one-year classification.

The factual situation surrounding the presence of the Appellant in Iowa must be examined in the light of the interest of the State of Iowa in a dissolution proceeding as evidenced by the preceding public policy of the state. When so examined, it is the conclusion of the Appellee that a reasonable state of facts does exist which reasonably justify a durational residency requirement and that therefore, the statute does not deny equal protection under the traditional tests.

However, the Appellant has alleged that her constitutional "right to travel", being a fundamental right, it is violated by the residency requirements in Iowa. In that reference, we will borrow a conclusion reached by the court in *Whitehead v. Whitehead*, (1972), 402 Pac.2d 939, p. 942:

> "It is evident the plaintiff filed a complaint in this case in the light of the decision in *Shapiro v. Thompson*, 394 U.S. 618, 89 S. Ct. 1322, 22 L.Ed.2d 600 (1969)."

In addition to *Shapiro*, the Appellant relies heavily on this court's decision in *Dunn v. Blumstein*, 405 U.S. 330, 92 S. Ct. 995, 31 L.Ed.2d 274. *Shapiro* was a welfare case and *Dunn* was a voting rights case. The Honorable Judge Roy L. Stephenson, Circuit Judge, in his opinion, below, correctly pointed out the distinction between these type cases and the case where the issue is

a dissolution of marriage. (Jurisdictional Statement Appendix A, pp. 3-5).

The District Court in the State of Florida, the Honorable Judge Hodges, reached much the same conclusion as did Judge Stephenson in stating that the penalty on interstate travel was de minimis and to the extent that such penalty does exist, it is justified by a compelling state interest:

> "In summary, it may be said beyond peradventure that many state residency requirements have been born or perpetuated as a result of legislative habit or an occasional display of provincialism with little or no deliberate thought being given to the purpose or lack of purpose involved, or whether other provisions in the particular statutory scheme were already sufficient to accomplish that purpose. This is not so in the case of divorce. Residency requirements are the *sine qua non* of domicile, and domicile is peculiarly essential, not merely because of technical or abstract jurisdictional considerations relevant only to the state's internal policies or procedures, but because a divorce as a matter of practical and constitutional necessity can be obtained ex parte on the basis of constructive service of process with permanent future effect upon the lives and property of third persons as well as the rights of sister states. The state must go slow, it must be careful, and when it undertakes to act, it owes a duty to other states and other affected parties to make a record in support of its judgment that will withstand collateral attack and merit full faith and credit. The Florida residency requirement, proof of which must be corroborated, is not a 'drastic means' of endeavoring to obtain that vital objective either in terms of the length of the residency period or in its effect upon the right it qualifies. Time is the essence of an abortion or an election or the receipt

> of welfare assistance (upon which the necessities of life may depend), but it is virtually irrelevant in the case of divorce. The penalty to interstate travel is *de minimis*, and to the extent such penalty does exist, it is justified by a compelling state interest." 359 Fed.Supp. 1225, 1234. *Shiffman and Makres, Plaintiffs, v. Askew* (M.D. Florida; Tampa Division; June 1, 1973; 359 F.Supp. 1225 (1973))

In the past few years the courts all over the country have been concerned with the issue presented by this case. Much has been written and the philosophy of the durational residency requirement as an objective test for proof of domicile has been upheld by many of the courts where they applied the traditional standard test or the stricter compelling state interest test. The discussions by the courts in the following cases, in the opinion of the Appellee, clearly negate the Appellant's position herein: see, *Place v. Place*, 129 Vt. 236, 278 A.2d 710 (1971); *Whitehead v. Whitehead*, supra; *Coleman v. Coleman*, 32 Ohio St.2d 155, 291 N.E.2d 530 (1972); *Shiffman v. Askew*, supra; *Davis v. Davis*, Minnesota, 210 N.W.2d 221 (1973).

DIVISION II

NEITHER THE FIRST AMENDMENT RIGHT TO PETITION THE GOVERNMENT FOR REDRESS OF GRIEVANCES OR THE DUE PROCESS RIGHT OF THE FOURTEENTH AMENDMENT ARE VIOLATED BY ONE-YEAR RESIDENCE REQUIREMENT IN DISSOLUTION OF MARRIAGE CASES.

The Appellant would equate the factual situation of this case with that found in *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780 (1971). In *Boddie*, plaintiffs were welfare recipients who were barred from having their divorce actions heard by the state court, having

jurisdiction over divorce, because of the refusal of the court officers to accept their complaints for filing without prepayment of the court costs. The validity of a durational residential requirement was not at issue in the case. However, the Appellant appears to argue that the cases are the same when he states, "as in *Boddie*, where the payment of the filing fee constituted an absolute pre-condition to access to the divorce court, the Iowa residency requirement presents an impenetrable obstacle to the newly arrived petitioner". *Boddie* clearly held that due process prohibits any state from denying indigents access to its divorce courts solely because of inability to pay court costs. The classification struck down in said case was one based on wealth, not residency or domicile. The court in *Whitehead*, supra, clearly distinguished *Boddie* with its wealth classification from the residency requirement by stating:

> "This court has held that the residential requirement for divorce in our statute is jurisdictional * * * the word 'jurisdictional', as used in that connection, does not have reference to the jurisdiction of the court to hear and act on a case; rather, it refers to jurisdiction which every state must have over the marriage relationship as a pre-requisite to exercising its control over divorce. * * * In this respect it is similar to Section 580-41, which sets forth grounds for divorce. An applicant for divorce who fails to prove a ground for divorce will not be granted a divorce because of failure to satisfy a substantive requirement for divorce. Similarly, an applicant who fails to prove that he has been domiciled or has been physically present in the state for one year, will not be able to obtain a divorce because of failure to satisfy a substantive requirement, not because he is denied access to court.
>
> "Thus, we do not think that *Boddie* is relevant to the determination of validity of the residential requirement for divorce * * * "

In Iowa, the same result must be reached. In *Williamson v. Williamson*, 1917, 179 Iowa 489, 161 N.W. 482, the court stated as follows:

> "That a bonafide residence is essential to confer jurisdiction has been the rule of this court since *Hines v. Hines*, 1 Iowa 36 (1855) * * * In other words, such a residence is essential to the jurisdiction of the court."

In a more recent case, *Davis v. Davis*, (1973), 210 N.W.2d 221, the Minnesota court cited *Whitehead*, supra, for the same reason, stating:

> "We believe that *Boddie* is clearly distinguishable since the indigents were permanently (or at least as long as they were indigent) barred from obtaining access to the divorce court. Here plaintiff is not denied access to the courts, since access is only *temporarily* delayed." [emphasis ours]

As stated by Judge Stephenson in his opinion below:

> "Unlike voting or welfare, the concept of divorce is not a constitutional right, nor is it a basic necessity to survival."

This principle is enlarged both in *Whitehead* and in *Shiffman* in the language of Judge Hodges when he stated:

> "Time is the essence of an abortion or an election or the receipt of welfare assistance (upon which the necessities of life may depend), but it is virtually irrelevant in the case of divorce."

The record in this case clearly shows that the Appellant was not denied access to the court by reason of any suspect classification based upon wealth, nor were the doors of the court house closed to her permanently. Domicile is the sine qua non of a dissolution of marriage proceeding. The one-year durational residency requirement does not discriminate

against the appellant, but serves as a reasonable *objective* standard and is, therefore, not overbroad in its reach.

DIVISION III

THE ABSTENTION DOCTRINE AS APPLIED IN *YOUNGER v. HARRIS* AND RELATED CASES SHOULD ORDINARILY APPLY IN CASES WHERE A STATE STATUTE IS CHALLENGED WITHOUT HAVING FIRST BEEN DETERMINED BY THE HIGHEST COURT IN THE STATE.

The Appellee agrees that ordinarily the Abstention Doctrine has much merit and that federal courts should refrain from passing on the constitutionality of a state statute when that issue has not been final determined by the highest court in the state's jurisdiction. The Appellee, in its Answer, raised this issue (Appendix p. 17(d)) but did not argue the issue on its merits after reviewing the various cases on the legal points involved. In addition to this case, the following cases have been determined by various federal and state courts throughout the nation. See, *Place v. Place*, 129 Vt. 326, 278 A.2d 710 (1971); *Whitehead v. Whitehead*, 53 Hawaii 302, 492 P.2d 939 (1972); *Porter v. Porter*, 112 N.H. 403, 296 A.2d 900 (1972); *Coleman v. Coleman*, 32 Ohio St.2d 155, 291 N.E.2d 530 (1972); *Stottlemyer v. Stottlemyer*, 224 Pa. Super. 123, 302 A.2d 830 (1973); *Shiffman v. Askew*, 359 F. Supp. 1225 (M.D. Fla. 1973); *Wymelenberg v. Syman*, 328 F. Supp. 1353 (E.D. Wis. 1971); *Davis v. Davis*, ___ Minn., ___, 210 N.W.2d 221 (1973); *Mon Chi Heung Au v. Lum*, 360 F. Supp. 219 (D. Hawaii 1973); *Larsen v. Gallogly*, 361 F. Supp. 305 (D.R.I. 1973).

Since the above cases have been decided, three more cases on the same subject matter have recently been decided: *Alaska v. Adams*, 42 L.W. 2611 (May 23, 1974); *Ashley v. Ashley*, 42 L.W. 2612 (May 16, 1974); and *Fiorentino v. Probate Court*, 42 L.W. 2540 (March 29, 1974).

This adds to the total states involved, the states of Alaska, Nebraska and Massachusetts. The total score at this writing appears to be nine in upholding the constitutionality of a durational residency statute and five finding them to be unconstitutional.

While this does not seem to be an organized movement in challenging the durational residency requirement in the field of domestic relations, there does seem to be a great deal of similarity in the cases. There is every possibility that additional cases in this area can be expected.

In view of the above, the three-judge court that decided this case should probably have proceeded to the merits.

CONCLUSION

The decision up for review by the three-judge court below was not unanimous. There is much merit in the dissent of the Honorable Edward J. McManus, particularly in his comments concerning the harshness of the objective test standard, compared to a case-by-case analysis of a subjective standard on the issue of residency or domicile. In the exhaustive opinions of many of the able courts and capable lawyers who have considered the issue of the durational residency requirement, it is apparent that the issue has been well presented. This Appellee can add little to the arguments already presented by both sides, except to state that underlying all of the cases is a fear on the part of the

states best expressed by Judge Reardon in *Fiorentino v. Probate Court*, supra, Massachusetts, in his dissenting opinion. After expressing an opinion that the durational residency requirement was jurisdictional in nature and best serves the commonwealth's interest, he added:

> "The majority, however, holds that there exists a less restrictive means of achieving the commonwealth's interests, namely, a case by case examination of each potential divorce petitioner to determine whether he or she possesses a requisite domiciliary intent to establish jurisdiction. This approach ignores the universally unhappy experience of divorce courts when relying on anything other than strict objective tests. No other sector of the judicial process has been so fraught with sham and deception. The sense of urgency that parties bring to a divorce action frequently overcomes what might normally be an extreme reluctance to lie to a court."

The opinion of the three-judge court below should be affirmed.

Respectfully submitted,

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